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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 229

ESTATE OF HOUNSELL; HOUNSELL, ADMINISTRATOR,
Petitioner,

vs.

DEPARTMENT OF TAXATION OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The petitioner, the Estate of Nellie Hounsell, deceased, E. J. Hounsell, administrator, prays that a Writ of Certiorari issue to review the order of the Supreme Court of the State of Wisconsin denying a motion for rehearing entered June 9th, 1948, and a judgment of said Court entered February 17th, 1948. The opinion is found in 252 Wis. 138. See appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. par. 344 the Judicial Code of the U. S. Sec. 237 and the Amendments thereof.

The Question Presented

Is sec. 72.01 (6) of the Wisconsin Statutes of 1945 as construed by the Supreme Court of Wisconsin in this case contrary to the 5th and 14th Amendments of the Constitution of the United States? Is this Statute valid as construed by the Wisconsin Court in view of the Estate of Schlesinger, 270 U. S. page 238 reversing the Supreme Court of Wisconsin 184 Wis. page 1 and *Hoeper* v. *Tax Comm. of Wisconsin,* 284 U. S., page 206, reversing the Supreme Court of Wisconsin 202 Wis. 493? Is a Statute valid that imposes an inheritance tax on the husband's property because of the death of his wife when documentary title is in the name of the husband and wife?

How the Question Was Raised

The Supreme Court of Wisconsin had heretofore construed Sec. 72.01 (6) of the Wisconsin Statutes as permitting the consideration of all competent evidence pertaining to the title to properties in joint names. Estate of Mahoney (1939), 233 Wis. 138 on page 144, 288 N. W. 763.

The decision in this case is the first indication that the Supreme Court of Wisconsin would construe this statute so as to preclude consideration of the facts as to title to property and in such a manner as to make the statute contrary to the 14th and 5th Amendments of the Constitution of the United States (R. 65).

The trial court considered all of the evidence in this case following the rule of the *Mahoney* case. The Attorney General by argument and brief urged the Court to consider all of the evidence as did the appellant.

On motion for rehearing the Constitutional question was raised (see appendix). The motion for rehearing was denied without costs (R. 72).

Under such facts this Court may take jurisdiction. *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 675.

The Statute Involved

The Statute involved is "Sec. 72.01 (6) Wisconsin Statutes 1945, Joint interests.

> Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer of one half or other proper fraction thereof taxable under the provisions of this chapter in the same manner as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor, by will."

Decision of the Court

The decision of the Supreme Court of the State of Wisconsin said "The terms of the statute involved here leave no room for questioning from where the interest of each of the parties came. It states the rule as affecting cases of this character, and the only exception which exists in favor of a surviving tenant is where the joint title has come into being under, and is a part of, a transaction clearly indicating a trust relation or the existence of an agency only. Otherwise, all that is needed to set the statute in motion is to have property in the joint names of the parties. When

that is the case and one of the parties dies, the right of the other to the whole 'shall be deemed a transfer of one half . . . thereof.'

"The order including for inheritance tax purposes one-half of the property held in the joint names of E. J. and Nellie Hounsell must therefore be affirmed." (Decision is set forth in full in appendix).

The Importance of the Question

The practice of putting properties in two names and the increasing number of inheritance tax problems arising because of this practice and the validity of the statute makes this issue important to the State of Wisconsin and all States having a similar statute.

The amount involved in this particular case is the sum of $5,374.17.

Wherefore we respectfully urge this Court to issue a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

A. D. SUTHERLAND,
Attorney for Appellant,
Fond du Lac, Wisconsin.

June 28, 1948.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The constitutionality of Wisconsin Statutes, 72.01 (6) was raised on motion for rehearing before the Supreme Court of Wisconsin.

The decision of the Supreme Court of Wisconsin construed this Statute as to preclude the consideration of evidence contrary to its prior interpretation of the same statute in the Estate of Mahoney, 233 Wis. 138 (1939), 288 N. W. 763. "We hold that the Court's finding of such joint ownership is sustained by the evidence. . . . The inheritance tax assessed on the basis of Josephine's one-half interest must be sustained."

The decision in the *Hounsell* case is the first intimation that the Supreme Court would construe this Statute as precluding the consideration of the facts of the case.

The Attorney General and appellant argued to the Supreme Court that evidence be construed. The lower Court considered all the evidence.

> "A Federal question raised for the first time on petition for rehearing in the highest court of the State, is raised in time when it is presented by a construction placed upon a Statute by such Court in the decision at variance with a construction formerly adopted by it."
> *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 (74 L. Ed. 1107).

The decision of the Supreme Court was an unexpected and not reasonably anticipated construction of a Wisconsin Statute which gives the Supreme Court of the United States the right of review though the constitutional question is first raised on a motion for rehearing.

Great Northern Ry. Co. v. *Sunburst Oil & Ref. Co.* (1932); 287 U. S. 358; 77 L. Ed. 360;
State of Mo. v. *Gehner,* 281 U. S. 313; 74 L. Ed. 870;
Sanders v. *Shaw,* 244 U. S. 317; 61 L. Ed. 1163.

"The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights of the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278; 57 L. Ed. 510; 33 Sup. Ct. Rep. 312. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

Sec. 72.01 (6) as construed by the Wisconsin Courts leaves no room for the consideration of evidence as to title of properties put in the name of two or more persons. The Statute attempts to create a fact and is contrary to the 5th and 14th Amendments of the Constitution of the United States. It precludes consideration of evidence and is not due process and deprives this appellant of property contrary to the Constitution of the United States.

Schlesinger v. *Wis.*, 270 U. S. 230, reversing 184 Wis. 1;
Hoeper v. *Tax Com.*, 284 U. S. 206, reversing 202 Wis. 493;
Western & Atlant. Ry. v. *Henderson*, 279 U. S. 639;
Manley v. *Ga.*, 279 U. S. 1;
McFarland v. *American Sugar Ref. Co.*, 241 U. S. 79.

When property was placed in the name of two or more persons the Wisconsin Supreme Court considered all of the evidence in determining title in all cases where sec. 72.01 (6) of the Wisconsin Statutes was not involved.

Tweeddale v. *Tweeddale*, 1903, 116 Wis. 517;
Marshall & Illsley Bank v. *Voigt*, 1934, 214 Wis. 27, 252 N. W. 355;
Estate of Staver, 1935, 218 Wis. 114; 260 N. W. 655;
Estate of Krause, 1942, 241 Wis. 41; 4 N. W. 2nd 122.

It is this statute as construed that prevents this appellant from having the fact of ownership determined by evidence.

The Court's construction of this statute requires this appellant to pay an inheritance tax on the property of E. J. Hounsell solely because his wife died. The monies were placed in the name of husband and wife for convenience. As in the *Voigt* case, *supra*, they were always E. J. Hounsell's money. This Court now says that this statute makes one half of these properties pass to E. J. Hounsell because his wife died although they always were the properties of E. J. Hounsell and E. J. Hounsell must pay an inheritance tax on his own properties.

In the *Hoeper* case (284 U. S. 206), this court said an income tax statute that made the husband pay a tax on his wife's income and in effect made the wife's income the husbands was contrary to the 14th Amendment.

We respectfully submit that 72.01 (6) is equally void and certiorari be granted that justice be done.

Respectfully submitted,

A. D. Sutherland,
Attorney for the estate of Nellie Hounsell, deceased. E. J. Hounsell, Administrator.

APPENDIX A

Motion for Re-Hearing

Title of Case

Now comes E. J. Hounsell, administrator of the estate of Nellie Hounsell, deceased and moves this Court for a re-hearing of its decision in this case filed February 17th, 1948.

Ground for Motion

Whereas the appellant has heretofore, and within the time provided by law and the rules of the above entitled court, served and filed his motion for re-hearing of his appeal in the above entitled case;

Therefore, now comes the appellant above named and states and asserts the following as some of the grounds in support of his motion for rehearing and for rehearing of his appeal in said entitled case;

That the decision of this court affirming the order of the court below deprives appellant as administrator of said estate of its property without due process of law, and denies him and said estate the equal protection of the laws, all contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States, in the following particulars, among others:

1. Section 72.01 (6) of Wisconsin Statutes, 1946, is so construed as to prevent the consideration of the evidence introduced by the appellant explaining the title to the property in question; and as to prevent this appellant from "questioning from where the interest of each of the parties came;" and to prevent consideration of the admissible evidence that the ownership of property is in fact different than the indicated documentary title.

2. By its decision, which is so arbitrary as to be unconstitutional and contrary to such amendments, the Supreme Court deprives this appellant of the right to introduce evidence by stating that "E. J. Hounsell is in effect seeking to reform title," when the fact is that E. J. Hounsell is not a party to this litigation; and E. J. Hounsell as administra-

tor, offered evidence to oppose the imposition of an unjust tax upon this estate. Under previous decisions of this court in construing Section 325.16, Wis. Stats. 1945, the law was established that, while ordinarily if the cause of action arises out of a transaction with the deceased person, the survivor may not testify, that rule does not apply where the claimed cause of action is said to arise from statutes, which, in this case, are the inheritance tax statutes passed by the Legislature of the State of Wisconsin.

Dated: March 10, 1948.

ESTATE OF NELLIE HOUNSELL, DECEASED,
E. J. HOUNSELL, as Administrator.
By A. D. SUTHERLAND,
Its and His Attorney.

APPENDIX B

Decision of the Court

FAIRCHILD, *J.*:

The title to the real and personal property involved in this appeal was so fixed as to make E. J. Hounsell and his wife joint tenants and to bring the property, for inheritance-tax purposes, under the terms of sec. 72.01 (6), Stats. 1945. The language of that statute is clear. It provides that whenever property is held in the joint names of two persons, upon the death of one, the right of the survivor to the immediate ownership of the property shall be deemed a transfer of one half of the property, taxable in the same manner as though the property belonged to the parties as tenants in common and had been bequeathed or devised to the surviving party by the deceased.

The appellant contends that there was no taxable interest to pass on Nellie Hounsell's death because she had no actual interest in the property. She had not bought an interest in it, and no gift had been made to her of a one-half interest. To show that no valid gift had been made to her, appellant cites a number of cases which are to be distinguished from the one at bar. In Marshall & Illsley Bank *v.* Voigt (1934), 214 Wis. 27, 252 N. W. 355 and Estate of Krause (1942),

241 Wis. 41, 4 N. W. (2d) 122, bank deposits in joint accounts were involved. In each case there was a claim by the estate of the deceased that the deposit belonged to the estate rather than to the joint holder of title to the account, and in each case this court held that there had been no valid gift of the account by the deceased to the other party whose name appeared on the account. In the Marshall & Illsley Bank case it was found that the accounts were carried in the joint names solely for the convenience of the deceased in handling the fund, and in the Krause case the purpose of carrying the joint bank account was to secure additional deposit protection. In estate of Staver (1935), 218 Wis. 114, 260 N. W. 655, this Court held that a joint payee of a certificate of deposit took title by survivorship in the absence of clear and satisfactory evidence that would warrant affecting the legal title with a trust. In none of these cases concerning the question of joint ownership was there an inheritance tax problem involved. None of these cases arose under section 72.01 (6). Like those cases, the one at bar does involve joint bank accounts. Here, however, those joint bank accounts are part of an evident pattern or policy of joint ownership by the husband and wife of their property. Unlike those cases, this one involves real estate, real-estate mortgages, and a note, in addition to the bank deposits. No special reason for keeping the bank accounts in the joint names appears to justify treating them differently from the other property jointly owned. There is not evidence to justify holding that Nellie Hounsell held her half interest in trust for her husband. As the trial judge said in his decision,

"The title to all of this property is in their joint names of record, and E. J. Hounsell takes title thereto as the surviving joint tenant. The only way he could avoid taking title in this way would be by some proceeding in court against the estate of his deceased wife to have the deeds, assignments, mortgages reformed to conform to what he claims is the true intent of the parties, or to declare that Nellie Hounsell held an undivided one half of the property during her lifetime in trust for said E. J. Hounsell."

A discussion of additional cases cited by the appellant, dealing with the law of gifts, is unnecessary since none of

them involves joint tenancy. Will of Mangan (1925), 185 Wis. 328, 200 N. W. 386; Estate of Ogden (1932), 209 Wis. 162, 244 N. W. 571; Madison Trust Co. *v.* Skogstrom (1936), 222 Wis. 585, 269 N. W. 249; Tucker *v.* Simrow (1946), 248 Wis. 143, 21 N. W. (2d) 252.

The terms of the statute involved here leave no room for questioning from where the interest of each of the parties came. It states the rule as affecting cases of this character, and the only exception which exists in favor of a surviving tenant is where the joint title has come into being under, and is a part of, a transaction clearly indicating a trust relation or the existence of an agency only. Otherwise, all that is needed to set the statute in motion is to have property in the joint names of the parties. When that is the case and one of the parties dies, the right of the other to the whole "shall be deemed a transfer of one half . . . thereof." The order including for inheritance-tax purposes one half of the property held in the joint names of E. J. Hounsell and Nellie Hounsell must therefore be affirmed.

Objection was raised at the hearing to testimony of E. J. Hounsell on the ground that it constituted evidence of transactions with the deceased. The trial court heard the testimony subject to the objection. In its decision the court held that E. J. Hounsell was incompetent to testify as to any transactions with the deceased and the evidence involving the same was thereby rejected. A brief of amicus curiae presented on this appeal makes the persuasive argument that sec. 325.16, Stats. 1945, ought not render an heir, legatee, devisee, or donee incompetent to testify in an inheritance tax hearing. That statute provides:

"No party or person in his own behalf or interest, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his title or sustains his liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his own behalf, introduce testimony of himself or

some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. . . ." It is suggested that the cause of action in cases like this is based upon the claim of the state to recover inheritance-taxes and that that cause of action arises from the state's power to tax and not from the deceased.

We recognize that this rule of evidence, set forth in sec. 325.16, Stats. — may exclude evidence that might promote rather than impede justice. Nevertheless, in applying that statute to the facts of this case, we conclude that the trial court made the proper ruling. By claiming that no interest passed on Nellie Hounsell's death, E. J. Hounsell is in effect seeking to reform the evidences of title. Were he to attempt that in any other type of proceeding, he would clearly be incompetent to testify as to any transactions with his deceased wife. Inasmuch as the same result is sought in this proceeding, it is considered that the same rule of evidence should apply.

Because all material facts are before the court without consideration of the inventory we find no reason to hold, as appellant suggests, that the inventory was not properly before this court on appeal.

By order of the Court.—Order affirmed.

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In the

Supreme Court of the United States

October Term, 1948

No. 229

E. J. HOUNSELL, Administrator of the Estate of Nellie Hounsell, deceased,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Respondent.

REPLY TO RESPONDENT'S BRIEF

Respondent contends there is no substantial Federal question involved in this case and that the Supreme Court of Wisconsin decided this case upon the evidence.

THE QUESTION IS SUBSTANTIAL

Illinois has a similar statute as does Connecticut. (see note). The question is substantial. Particularly is this true because of the common practice during the war years of putting monies in bank accounts of men in service in the names of parent and service man for convenience and the growing practice of others to do likewise.

A FEDERAL QUESTION IS INVOLVED.

The Supreme Court of Wisconsin has construed this Statute (72.01) (6) so as to (a) preclude the consideration of evidence (b) create a conclusive presumption and (c) create facts contrary to actualities; all of which is not due process. (see brief in support of petition for a writ).

Revised Statutes of Illinois, Chapter 120, Section 375, subsection 5, as follows: "Whenever property, real, personal, or mixed, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositories in the joint names of two or more persons, and payable to either or the survivor, upon the death of one of such persons, the right of the surviving joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this Act in the same manner as though a fractional part of the property to be determined by dividing the value of the entire property by the number of joint tenants, joint depositors or persons, belonged absolutely to the deceased joint tenant, joint depositor or person and had been devised or bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will."

Section 396e, 1939 Supplement to the General Statutes of Connecticut, as follows: "whenever property shall be held in the joint names or two or more persons and the survivor or survivors of them, the right of the survivor or survivors to the immediate ownership or possession and enjoyment of such property shall be taxable transfer and the tax shall be computed as though a fractional part of the property, determined by dividing the fair market value of the entire property by the number of persons in whose joint names it was held, belonged absolutely to the deceased person and had been bequeathed or devised by him to the survivor or survivors by will; provided, in addition to any exemption granted under the provisions of this chapter, the provisions of this section shall not render subject to a succession tax joint checking or savings accounts in banks or savings banks payable to either or to the survivor if the aggregate thereof shall be less than five thousand dollars, but a fractional share of any excess over five thousand dollars shall be taxable. The provisions of this section shall not be construed to prevent the taxability, in whole or in part, under the provisions of subsection (c) or (d) of section 395e of any property held in the joint names of two or more persons and the survivor of them, including any joint checking or savings account in any bank or savings bank. The limitations imposed by section 1360 shall apply to any tax imposed under the provisions of this section."

(a) "The terms of the statute leave no room for questioning from where the interest of each of the parties came." This makes documentary title conclusive and prevents the consideration of the most important fact in this case. The question at issue was whether Nellie Hounsell had any interest in the properties in question when she died. E. J. Hounsell claimed it was his money that he put in the bank and invested in the two names and Nellie Hounsell contributed nothing and that he had no intent to give his wife an interest and there was no delivery or surrender of control.

The Court however stopped this claimant short at the first point. It would not consider the fact that this was E. J. Hounsell's money at any time.

(b) Documentary title according to the Court became final. It further said "All that is needed to set the statute in motion is to have property in the joint names of the parties. When that is the case and one of the parties dies the right of the other to the whole shall be deemed a transfer of one-half." A conclusive presumption is thus created when properties are in two names. Whether this was done by fraud, mistake or for convenience and created an agency is immaterial.

(c) The Court's construction of this statute made one-half of the properties in question pass on the death of Nellie Hounsell to E. J. Hounsell as though she willed it to him **even though all interest in this property** was E. J. Hounsells.

If for instance A invested in mortgages through a

real estate agent who took them in the name of A and B without the knowledge of either A or B. Upon the death of B according to this statute and this Court one-half of the property passes to A as though B willed it to A. A was always the owner and now must pay a transfer tax on his own properties because A died. Such is the effect of this decision.

Any one of the foregoing raised a Constitutional question and is sufficient to invalidate Sec. 72.01 (6) Wisconsin Statutes 1945.

Schlesinger v. Wis. 270 U. S. 230
Hoeper v. Tax Com. 284 U. S. 206
Western & All. Ry v. Henderson 279 U. S. 639
Manley v. Ga. 279 U. S. 1
McFarland v. American Sugar Ref. Co. 241 U. S. 79

THE COURT DID NOT DECIDE THIS CASE UPON THE EVIDENCE.

Respondent alleges that the Supreme Court of Wisconsin decided this case upon the evidence. In reply it is self evident that this is not true if the Court could not consider whether E. J. Hounsell earned this money and invested it and caused documentary title to be in two names with no intent to make a gift.

According to all Wisconsin cases referred to in the decision no gift was made according to the facts. These cases are not overruled. They are not in point said the Court R. pg. 67, because this Statute was not involved. It is the statute that precludes the consideration of the material facts as was done in those cases.

It is to be noted that there was no cross examination and no evidence introduced by respondent and also that the inventory quoted from was never offered nor received in evidence. Although put in the record by the trial Court after rendering his decision and the Bill of Exceptions had been settled the Supreme Court did not consider this challenged error because it was not necessary because of the view the Court took of this case. Thus undisputed testimony was not considered by the Supreme Court. If it had and still the Court arrived at the conclusion it did it would have overruled a long line of Wisconsin cases. Said the Court, R. pg. 67, "In none of these cases concerning the question of joint ownership was there an inheritance tax problem involved. None of these cases arose under section 72.01 (6)."

"The title, to the real and personal property involved in this appeal was so fixed as to make E. J. Hounsell and his wife joint tenants." The documentary title was all the Court needed to consider.

CONSTITUTIONALITY

Respondent claims this statute is valid citing Helvering v. City Bank Farmers Trust Company, 1935, 296 U. S. 85. The last paragraph of this case affirms the principles and cases upon which appellant relies.

> "There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in con-

templation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to the transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment. 17. In the same catagory falls a statute seeking to tax separate income of a wife as income of her husband. 18.

17. Heiner v. Donnan, 285 U. S. 312. 76 L. ed 772, 52 Sup. Ct. 358. Compare Schlesinger v. Wisconsin 270 U. S. 230, 80 L. ed 68, 70 L. ed 557, 46 S. Ct. 260, 43 A. L. R. 1224.

18. Hoeper v. Tax Commission, 284 U. S. 206, 76 L. ed 248, 52 S. Ct. 120, 78 A. L. R. 346.

LOCAL QUESTION

Respondent contends this is a local question citing Wallace v. St. John (1903) 119 Wis. 585, 97 N. W. 197. There was no issue in this case as to whether the property was the husband's or the wife's. As in respondent's assumption throughout his brief it was taken for granted that the title was jointly held. This is not true in this case according to the facts. It is the statute that makes the documentary title conclusively joint. We concede that if the property was in fact jointly owned, then on the death of Nellie Hounsell one-half passed and this transfer is subject to the tax and a local question is involved but since the property was not in fact joint counsel's argument is not in point. Said the Court in substance that because no trust was involved in this case therefore it would not consider the facts.

Respondent (brief Pg. 6) refers to bank signature cards. The statements therein establish the rela-

tionship between the bank and the depositor and do not effect title to the deposits.

Marshall & Illsley Bank v. Voight 214 Wis. 27 on pg. 33, 252 N. W. 355 on pg. 354.

Also respondent says the lower Court and the Supreme Court said the testimony of E. J. Hounsell was inadmissable (brief Pg. 8) Both Courts held that Hounsell could not testify as to transactions with the deceased. R. Pg. 69 R. Pg. 32. All other testimony was admissable. Because the question was raised by Amicus Curae the Court expressed its views. There was ample undisputed admissable testimony by E. J. Hounsell that it was his money deposited and invested. He earned the money. It was the statute that precluded this evidence and not the local law.

Respondent says in his brief page 10, "It reviewed the laws of Wisconsin and particularly the decision in the estate of Staver, 1935, 218 Wis. 114, 260 N. W. 655 where it was held that where property stands in the joint names of two persons a joint tenancy exists so that the survivor takes title unless there is presented clear and satisfactory evidence establishing a transaction which amounts to a trust or the existence of an agency." I do not believe this to be the law of Wisconsin.

Estate of Krause, 1942, 241 Wis. 41, 4 N. W. 2nd 122.

In that more recent case the intent of the depositor and the surrender of control were dominant

facts. In the absence of these elements no gift was made when A deposited money in a bank in the name of A and B. There was no trust or agency considered. The deposit was made for the purpose of securing additional Government protection.

If the Supreme Court of Wisconsin said the law was as respondent claims in his brief citing the Staver case then the law clearly would deprive one of property without due process because the facts could not be shown as to the ownership in any case not involving a trust or an agency.

In the Hounsell case the Court said the Staver, Krause and Voight cases were not in point. "In none of these cases concerning the question of joint ownership was there an inheritance tax problem involved. None of these cases arose under section 72.01 (6)." It was this Statute that made the Hounsell case different from those cases. It was the statute that prevented consideration of the facts as was done in the Krause case. It was the statute that prevented consideration of where the property came.

Respectfully submitted,

A. D. SUTHERLAND,

Atty. for Estate of Nellie Hounsell deceased.
E. J. Hounsell, administrator.

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In the

Supreme Court of the United States

October Term, 1948

No. 229

E. J. HOUNSELL, Administrator of the Estate of Nellie Hounsell, Deceased,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Respondent.

Brief of Respondent In Opposition To Petition For Writ of Certiorari

I. OPINION OF THE COURT BELOW.

The full opinion of the Supreme Court of Wisconsin is not set out at page 9 of the Appendix to the Petition for Writ of Certiorari. The recital of the facts by the Court is omitted. The full context is printed at page 65 of the Record and is reported in 252 Wis. 138 (Adv.) and 31 N. W. (2) 203.

II. JURISDICTION.

Respondent opposes the granting of a writ of certiorari on the ground that no substantial federal question is presented.

III. NATURE OF THE CASE.

Petitioner seeks review of a judgment of the Supreme Court of Wisconsin affirming an order entered by the County Court of Fond du Lac County, State of Wisconsin, in administration proceedings in the matter of the Estate of Nellie Hounsell, Deceased, determining the Wisconsin inheritance taxes payable therein.

The order held that one-half of property of the value of $170,843.48, which stood in the joint names of the deceased and E. J. Hounsell, her surviving husband (the Administrator-Petitioner) was subject to Wisconsin inheritance taxation and taxable under the Wisconsin statutes to the surviving husband. He claimed that although the property stood in their joint names it was in fact only his because it was only money earned from his business and his investments that went into the joint properties and that his deceased wife used the bank accounts only at his request.

The County Court of Fond du Lac County and the Supreme Court of the State of Wisconsin both found that title to the property was so fixed as to make the decedent and her surviving husband joint tenants therein and therefore the property came within the terms of section 72.01 (6) of the Wisconsin Statutes of 1945.

IV. STATUTES INVOLVED.

Section 72.01, Wisconsin Statutes of 1945, so far as here material provides:

> "72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, * * * to any person, * * * in the following cases, except as hereinafter provided:
>
> "(1) * * *
>
> "(2) * * *
>
> "(3) * * *
>
> "(4) * * *
>
> "(5) * * *
>
> "(6) JOINT INTERESTS. Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer of one-half or other proper fraction thereof taxable under the provisions of this chapter in the same manner as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such de-

ceased tenant by the entirety, joint tenant or joint depositor, by will.

"(7) * * *

"(8) * * *

"(9) * * *."

Section 230.44, Wisconsin Statutes of 1945, provides:

"230.44 Estates in common. All grants and devises of land made to two or more persons, except as provided in section 230.45, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."

Section 230.45 of the Wisconsin Statutes of 1945, so far as here material, provides:

"230.45 Joint tenancies. (1) Section 230.44 shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

"(2) * * *

"(3) * * *."

Section 230.47 (2), Wisconsin Statutes of 1945 provides:

"(2) An administrator or executor shall include in his inventory the interest which the decedent owned as such joint tenant, or tenant by the entirety, or life estate before his death. The county court shall adjudicate in the final judgment or order for assignment regarding the termination of such joint tenancy, tenancy by the entirety, or life estate and regarding such other facts as are essential to a full and final determination of the rights of the parties interested."

Section 230.48 (2), Wisconsin Statutes of 1945 provides:

"(2) An administrator or executor shall include in his inventory the interest which the decedent owned as such joint tenant, or tenant by the entirety in any real estate mortgage note, bank account, stock, bond, chose in action or other personal property before his death. The county court shall adjudicate in the final judgment or order for assignment regarding the termination of such joint tenancy, or tenancy by the entirety and regarding such other facts as are essential to a full determination of the rights of the parties interested."

V. STATEMENT OF FACTS.

Nellie Hounsell died intestate on December 19, 1946, a resident of Fond du Lac, Wisconsin. (R. 37) She left her husband, E. J. Hounsell, 77 years of age, surviving as her sole heir. (R. 28) Property amounting to $170,853.48, consisting of real estate valued at $10,409.67 and personal property appraised at $160,443.81, stood at that time in the joint names of said decedent and her surviving husband. (R. 7-10, 13)

The real estate consisted of four (4) parcels in the State of Wisconsin conveyed to them by separate instruments dated in January, 1935, January 1939, September 1939 and July 1941, respectively, each naming them both as grantees. (R. 10, 28)

The personal property consisted of three (3) bank accounts in their joint names, and twelve (12) real estate mortgages and one (1) unsecured note, all payable to E. J. Hounsell and Nellie Hounsell, his wife. (R. 8, 9, 13)

Two of these bank accounts were savings accounts. One in the amount of $50,173.62 was with the National Exchange Bank of Fond du Lac, Wisconsin and in the name of "Mr. or Mrs. E. J. Hounsell or the survivor thereof." It had been opened on or before December 12, 1936 and existed continuously to Mrs. Hounsell's death. There were no withdrawals therefrom but only deposits. (Exs. 1 and 2, R. 41-43) The other savings account in the sum of $75,969.41 was with the First-Fond du Lac National Bank of Fond du Lac, Wisconsin in the name of "Mr. & or Mrs. E. J. Hounsell." (Exs. 14 and 15, R. 51-53) It was opened on October 3, 1933, designated No. 32671 and ran continuously to her death. The signature card for this account No. 32671 was signed by both the decedent and her husband on October 3, 1933. It expressly recites that they thereby opened a joint account and agreed that all monies deposited by either or both should be placed to the credit of them jointly, they might be withdrawn upon the request or order of both or either and on the death of either "be the sole and absolute property of the survivor, who shall have the absolute right to withdraw or be paid all monies on deposit." (Ex. 20, R. 58)

The third bank account was a checking account in the amount of $8,402.32 with the First-Fond du Lac National Bank in the name of "E. J. or Nellie Hounsell." (Ex. 16, R. 54) It had been in the name of E. J. Hounsell alone until August 5, 1944 when it was changed to their joint names. (R. 16) The signature card was signed by both on that date and expressly recites that the account is subject to withdrawal by either or the survivor and to the provisions of Section 72.11 of the Wisconsin Statutes which *inter alia*

prohibits a bank from paying over a joint account to the survivor before the inheritance tax is paid thereon or tax clearance obtained. (Ex. 18, R. 56)

The twelve (12) real estate mortgages of varying amounts were either originally payable to or had been assigned to "E. J. Hounsell and Nellie Hounsell, his wife," except one which was payable to "E. J. Hounsell and wife" and another which was payable to "E. J. Hounsell and Nellie Hounsell." (R. 14) They were executed or assigned to them on the following dates: Aug. 17, 1932; Oct. 19, 1935; Aug. 5, 1936; Sept. 1, 1936; May 18, 1940; April 16, 1943; Feb. 6, 1945; July 3, 1945; July 31, 1945; Dec. 8, 1945; Dec. 21, 1945 and Dec. 21, 1945, respectively. (R. 8-10, 28) The unsecured note for $528.60 dated October 17, 1941 ran to "E. J. Hounsell and Nellie Hounsell, his wife."

The foregoing facts were adduced at the hearing before the County Court for Fond du Lac County, State of Wisconsin, to determine the Wisconsin inheritance taxes payable in the administration proceeding of Mrs. Hounsell's estate. E. J. Hounsell, the surviving husband who was also the administrator, testified that all the money which went into these joint properties came from a sporting goods business he had operated for 49 years; that Mrs. Hounsell made deposits of money derived therefrom when he wanted her to and he did not have time to go to the bank; that at his specific request she several times drew monies from the savings account and put it in the checking account because he had bills which he then paid from the checking account; that the accounts were in their joint names so "in case I was busy or sick or something she could go to the bank and deposit"; that he included all income from the joint properties as his own in his income tax returns; that he

collected all interest or rent from the joint properties; and that he kept in his possession all mortgages, deeds and papers relating to the joint properties. All of this testimony was received subject to the objection that it was inadmissible under Section 325.16 of the Wisconsin Statutes as evidence of transactions by him with the deceased. (R. 19)

The County Court nevertheless considered all this testimony and found that upon the evidence and testimony the property in the joint names was under the law of the State of Wisconsin held in joint tenancy and therefore, under Section 72.01 (6) of the Wisconsin Statutes of 1945, inheritance taxes were payable on one-half thereof. Upon then addressing itself to the admissibility of the testimony of E. J. Hounsell, the County Court held that it was inadmissible under said Section 325.16 of the Wisconsin Statutes. (R. 28-32) E. J. Hounsell as administrator appealed from that part of the order determining inheritance taxes entered July 14, 1947 (R. 33) which determined the taxes payable in respect to the joint property. (R. 63)

The Supreme Court of Wisconsin upon considering all the evidence held that under the law of Wisconsin the property was so fixed as to be held in joint tenancy by the decedent and her husband and therefore one-half interest therein was taxable to the surviving husband under the express terms of Section 72.01 (6) Wisconsin Statutes of 1945. (R. 67) It also affirmed the lower court in holding that the testimony of E. J. Hounsell was inadmissible because Section 325.16 Statutes of Wisconsin of 1945 renders him incompetent to testify to transactions with the decedent. (R. 69)

VI. ARGUMENT.

Respondent asserts that no substantial federal question is presented for the following reasons:

A. THE MATTER PRESENTED IS NOT A FEDERAL QUESTION BUT SOLELY ONE OF LOCAL LAW.

The Supreme Court of Wisconsin did not hold that it construed Section 72.01 (6) Wisconsin Statutes of 1945 as precluding consideration of the facts as to the title of the property, as stated by petitioner. (Petition p. 2, Brief pp. 5, 6 and 7) On the contrary both the state trial court and the Supreme Court of Wisconsin fully considered all the facts adduced and held that even including the testimony of E. J. Hounsell, which was held to be inadmissible, the property was held in joint tenancy. (R. 32, 67)

The objective of the petitioner in the state courts was to establish that, notwithstanding the properties stood in the joint names, they were not held in joint tenancy. Whether or not there existed a joint tenancy depends upon the facts and the application thereto of the law of the State of Wisconsin. The Supreme Court of Wisconsin addressed itself to the contention of the petitioner, considered all the evidence, even though some was inadmissible, and held that under the general law of Wisconsin a joint tenancy existed. It specifically said:

> "The title to the real and personal property involved in this appeal was so fixed as to make E. J. Hounsell and his wife joint tenants and to bring the property for inheritance purposes, under the terms of Sec. 72.01 (6) Stats. 1945." (R. 67)

It reviewed the law of Wisconsin and particularly the decision in *Estate of Staver*, (1935) 218 Wis. 114, 260 N. W. 655, wherein it was held that where property stands in the joint names of two persons a joint tenancy exists so that the survivor takes title unless there is presented clear and satisfactory evidence establishing a transaction which amounts to a trust or the existence of an agency. There was specific decision that neither of these exceptions existed in the instant case but that rather there was "an evident pattern or policy of joint ownership by the husband and wife of their property." (R. 68)

It has long been the established law of Wisconsin that conveyance to husband and wife makes them joint tenants of the property. *Wallace v. St. John*, (1903) 119 Wis. 585, 97 N. W. 197. Also it is the law of Wisconsin that where property is held in joint tenancy by husband and wife title to the wife's interest in the property "was devolved upon him by the death of the wife and is therefore liable to taxation under the provision of Sec. 72.01 Stats." *Will of Ray*, (1925) 188 Wis. 180, 205 N. W. 917.

Accordingly the Supreme Court of Wisconsin applied the general law of Wisconsin to the facts of this case and held that as a result of the facts not establishing a trust or an agency, the terms of Section 72.01 (6) Wisconsin Statutes of 1945

> "* * * leave no room for questioning from where the interest of each of the parties came. It states the rule as affecting cases of this character, and the only exception which exists in favor of a surviving tenant is where the joint title has come into being under, and is a part of, a transaction clearly indicating a trust relation or the existence of an agency only. Otherwise, all

that is needed to set the statute in motion is to have the property in the joint names of the parties. * * *" (R. 68)

Very clearly the decision of the Supreme Court of Wisconsin in this case was grounded upon local law and its construction and application of Section 72.01 (6) Wisconsin Statutes was based thereon. The review of such a matter of purely local concern is not within the cognizance of the Supreme Court of the United States. *Manhattan L. Ins. Co. v. Cohen,* 234 U. S. 123, 136, 34 S. Ct. 874, 58 L. ed. 1245; *Ross v. Oregon,* (1912) 227 U. S. 150, 164, 33 S. Ct. 220, 57 L. ed. 458.

The construction of a state statute by the highest court of the State must be accepted by this Court in testing its validity under the Constitution of the United States. *Quong Ham Wah Co. v. Ind. Accid. Comm. of Calif.,* (1921) 255 U. S. 445, 41 S. Ct. 373, 65 L. ed. 723; *Tampa Waterworks Co. v. Tampa,* (1905) 199 U. S. 241, 26 S. Ct. 23, 50 L. ed. 170; *International Harvester Co. v. Wis. Dept. of Taxation,* (1944) 322 U. S. 435, 64 S. Ct. 1060, 88 L. ed. 1373.

This Court will follow the construction placed upon a state statute by the highest court of the State in order to determine whether a federal right is involved. *McElvaine v. Brush,* (1891) 142 U. S. 155, 12 S. Ct. 156, 35 L. ed. 971; *MacKay Tel. & Cable Co. v. Little Rock,* (1919) 250 U. S. 94, 39 S. Ct. 428, 63 L. ed. 863.

A state possessing the power to impose an inheritance tax, whether or not a certain interest was correctly subjected to the tax under the circumstances is purely a state question which is not reviewable by this Court. *Nickel v. Cole,* (1921) 256 U. S. 222, 41 S. Ct. 467, 65 L. ed. 900.

This Court is without jurisdiction to review the decision of the Supreme Court of Wisconsin in this case because there is no substance in the federal question upon which it depends to give it jurisdiction. *Great Northern R. Co. v. Alexander,* (1918) 246 U. S. 276, 38 S. Ct. 237, 62 L. ed. 713.

B. THE IMPOSITION OF THE TAX IS CLEARLY WITHIN THE JURISDICTION OF THE STATE TO TAX.

The assertion of the petitioner that Section 72.01 (6) Wisconsin Statutes of 1945, as interpreted and applied by the Supreme Court of Wisconsin precludes consideration of evidence and therefore is violative of the due process provision of the 14th Amendment to the Constitution of the United States is wholly without merit. The Supreme Court of Wisconsin did consider all the evidence and held that under the law of Wisconsin as applied thereto a joint tenancy existed in the property. As there devolved to the husband by survivorship the interest the deceased wife had in the property such passage of proprietorship is a proper subject of taxation by the State of Wisconsin and clearly within its taxing power and jurisdiction. The interest passed pursuant to and under the law of Wisconsin. The property was located in the State of Wisconsin. The decedent was a resident of Wisconsin and died within its boundaries. The surviving husband resides in the State of Wisconsin. His interest in the property is governed by and dependent on the law of Wisconsin.

The case of *Hoeper v. Tax Comm.,* (1931) 284 U. S. 206, 52 S. Ct. 120, 76 L. ed. 248, is not remotely in point. There the tax was payable by the husband on income he

did not receive and to which he had no right. Here the tax is laid upon the devolvement to the husband by survivorship of the interest which his deceased wife had in the property. He received an interest in the property which he did not possess immediately prior to her death. It is upon this interest that the tax is laid.

Taxation of that interest in jointly held property which passes by survivorship is valid and proper. *Tyler v. U. S.*, (1930) 281 U. S. 497, 50 S. Ct. 356, 74 L. ed. 991; *Gwinn v. Com'sr.*, (1932) 287 U. S. 224, 53 S. Ct. 157, 77 L. ed. 270; *Griswold v. Helvering*, (1933) 290 U. S. 56, 54 S. Ct. 5, 78 L. ed. 166; *U. S. v. Jacobs*, (1939) 306 U. S. 363, 59 S. Ct. 551, 83 L. ed. 763.

The provisions of sec. 72.01 (6) Wisconsin Statutes 1945 were enacted by Chap. 322, Laws of 1917, long before the joint tenancies here involved were created. There is thus no question of retroactive application of this tax statute.

Furthermore, it is well settled in the law of Wisconsin that the principles of joint tenancy are applicable to and pertain to personal property as well as real property. *Will of Meckler*, (1944) 246 Wis. 5, 16 N. W. (2) 373; *Will of Levy*, (1940) 234 Wis. 31, 289 N. W. 666; *Estate of Abddulah*, (1934) 214 Wis. 336, 252 N. W. 158.

In any event the declaration in Section 72.01 (6) Wisconsin Statutes that the interest in jointly held property which passes by survivorship is deemed a transfer and taxable as such, is valid as a legislative declaration reasonably requisite to prevent evasion of taxation. *Helvering v. City Bank Farmers Trust Co.*, (1935) 296 U. S. 85, 56 S. Ct. 70, 80 L. ed. 62.

The decision of the Supreme Court of Wisconsin in the case, and the denial of the motion for rehearing on the apparent ground that the assertion of a federal question was lacking in merit, are so plainly right as to not require reargument, and therefore no substantial federal question is presented. *Re Boardman,* (1897) 169 U. S. 39, 48 S. Ct. 291, 42 L. ed. 653; *Re Spies,* (1887) 123 U. S. 131, 8 S. Ct. 22, 31 L. ed. 80.

For the above reasons the writ of certiorari should be denied.

Respectfully submitted,

GROVER L. BROADFOOT,
Attorney General of Wisconsin,

HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,

Attorneys for Respondent.